BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ALRICK A. JOHNSON	)	
Claimant	)	
VS.	)	
	)	Docket No. 234,975
J & J MAINTENANCE	)	
Respondent	)	
AND	)	
	)	
INSURANCE COMPANY OF NORTH AMERICA	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier requested Appeals Board review of a preliminary hearing order entered by Administrative Law Judge Bryce D. Benedict on October 5, 1998, that granted claimant's request for preliminary benefits.

ISSUES

The issue before the Appeals Board is whether the ALJ exceeded his jurisdiction by granting preliminary benefits to claimant when the insurance carrier was not aware that the October 2, 1998 preliminary hearing was scheduled. Although notice was provided to the respondent, a separate notice of hearing was not sent to respondent's insurance carrier. Respondent and its insurance carrier contend that the ALJ's order should be reversed or remanded to give them an opportunity to contest accidental injury and notice.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the hearing record and considering the briefs of the parties, the Appeals Board finds as follows:

The preliminary hearing that took place on October 2, 1998, was held without the respondent or its insurance carrier being present. Following that hearing, the ALJ entered the preliminary hearing order that granted claimant's request for preliminary hearing benefits. The insurance carrier argues separate notice to the insurance carrier of a preliminary hearing is required by K.S.A. 1997 Supp. 44-534a(a)(1) which provides in pertinent part as follows:

> "The director shall assign the application to an administrative law judge who shall set the matter for a preliminary hearing and **shall** give at least seven days' written notice by mail to the **parties** of the date set for such hearing." (Emphasis added.)

Respondent and its insurance carrier, in their brief, also point to the language in K.S.A. 1997 Supp. 44-534a(a)(2) ". . . that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the **employer** the opportunity to present evidence, including testimony, on the disputed issues." (Emphasis added.)

The claimant's attorney entered into evidence at the October 2, 1998 preliminary hearing a copy of his July 22, 1998, 7-day demand letter to respondent and the ALJ noted that a Notice of Preliminary Hearing was mailed to the respondent on September 16, 1998. The notice specified the time and place of the preliminary hearing.

Implicit in the ALJ's decision to proceed with the preliminary hearing is a finding by the ALJ that proper notice of the preliminary hearing was given to the respondent when the claimant sent notice to the respondent and not to respondent's insurance carrier. Respondent's insurance carrier was shown as "unknown" on the Division's records. Based upon the subsequent entry of appearance and statements of counsel, the Appeals Board finds that Insurance Company of North America was the insurance carrier providing workers compensation coverage for the respondent on the alleged date of accident.

In Landes v. Smith, 189 Kan. 229, 235, 368 P.2d 302 (1962), one issue the Court faced was whether an insurance carrier who did not receive notice of a hearing and therefore was not present was bound by the judgment entered in the proceedings. Unfortunately the Court ultimately determined the question raised concerning the propriety of notice given to the insurance carrier was moot and need not be considered. However, before coming to that conclusion, the Court did go into a lengthy discussion of notice requirements as they relate to insurance carriers.

The Court noted K.S.A. 40-2212, which states in part:

> "Every policy issued by any insurance corporation . . . to assure the payment of compensation, under the workmen's compensation act, shall contain a clause providing that between any employer and the insurer, notice to and knowledge of the occurrence of injury or death on the part of the insured shall be notice and knowledge on the part of the insurer; and jurisdiction of the insured shall be jurisdiction of the insurer and the insurer shall be bound by every agreement, adjudgment, award, or judgement rendered against the insured."

The Court in Landes further stated: "This statute definitely provides that 'jurisdiction of the insured (employer) is jurisdiction of the insurer.' Jurisdiction over the person implies notice. Therefore, notice to the employer of the hearing is notice to the insurance carrier." Id at 235. The Appeals Board has previously held that separate notice to the insurance carrier is not required in Kansas. Martel v. Waste Management of Wichita, Docket No. 222,516 (July 1997). But since then there has been a change in the administrative regulation.

Formerly, K.A.R. 51-3-5a provided:

> "In no case shall the administrative law judge entertain an application for preliminary hearing when written notice has not been given to the **respondent** pursuant to K.S.A. 44-534a." (Emphasis added.)

K.A.R. 51-3-5a now provides:

> "In no case shall an application for preliminary hearing be entertained by the administrative law judge when written notice has not been given to the **adverse party** pursuant to K.S.A. 44-534a." (Emphasis added.)

This change in the language of the regulation was intended to take into consideration the 1993 amendment to K.S.A. 44-534a and address the situation where the respondent, as opposed to the claimant, applied for the preliminary hearing. It does not otherwise change the notice requirements.

The Appeals Board concludes sufficient notice was given to the respondent's insurance carrier of the October 2, 1998 preliminary hearing by serving respondent with notice of the time and place of the preliminary hearing. Furthermore, there being no limit to the number of preliminary hearings, respondent and its insurance carrier are free to request another hearing to present their evidence and be heard on the disputed issues.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the order by Administrative Law Judge Bryce D. Benedict dated October 5, 1998, should be, and is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of January 1999.

BOARD MEMBER

c: Jeff K. Cooper, Topeka, KS
Michael W. Downing, Kansas City, MO
Bryce D. Benedict, Administrative Law Judge

Philip S. Harness, Director